*Supreme Court of the United States.*

THORINGTON *v.* SMITH & HARTLEY.

The Confederate States, though not a *de facto* government in the highest sense of that term, were a government of paramount force having actual supremacy within certain territorial limits, and therefore a *de facto* government in such a sense as made civil obedience to their authority the duty of the inhabitants of the territory under their control.

Confederate notes as contracts in themselves are nullities, but they must be regarded as a currency imposed on the citizens of the insurrectionary states by irresistible force, and therefore contracts for payment in such currency, made between citizens of the Confederacy in the ordinary course of civil business and without direct intent to assist the insurrection are valid, and will be enforced by the courts of the United States.

A contract to pay dollars made between citizens of any state maintaining its constitutional relations with the National Government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence.

But the word dollars if used in a contract between citizens of a foreign state could be shown by parol evidence to mean dollars of a different kind from United States dollars, and the same rule must apply to a contract between citizens of the Confederate States.

A party entitled to be paid in Confederate notes, can only recover their actual value at the time and place of the contract in lawful money of the United States.

APPEAL from the Circuit Court of the United States, for the Middle District of Alabama.

This was a bill in equity for the enforcement of a vendor's lien.

Smith & Hartley purchased from Thorington a piece of land, and executed to him their promissory note for part of the purchase-money.

But it was insisted by way of defence that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery, in the state of Alabama, where all the parties resided in November 1864, at which time the authority of the United States was excluded from that portion of the state, and the only currency in use consisted of Confederate treasury notes, issued and put in circulation by the persons exercising the ruling powers of the states in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than $3000 in lawful money; that the contract price was $45,000; that this price, by the agreement of the parties, was to be paid in Confederate notes; that $35,000 were actually paid in these

notes, and that the note given for the remaining $10,000 was to be discharged in the same manner, and it was claimed on this state of facts that the vendor was not entitled to relief in a court of the United States.

This view was sustained in the court below, and the bill was dismissed.

The opinion of the court was delivered by

CHASE, C. J.—The questions before us upon appeal are these:—

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

2. Can evidence be received to prove that a promise expressed to be for the payment of dollars was in fact for the payment of any other than lawful dollars of the United States?

3. Does the evidence on the record establish the fact that the note for $10,000 was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty.

It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed.

But was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered.

It is familiar history that early in 1861 the authorities of seven states, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment within its boundaries of a separate and independent confederation. A governmental organization representing these states was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent.

In the course of a few months four other states acceded to this

confederation, and the seat of the central authority was transferred to Richmond, in Virginia.

It was by the central authority thus organized, and under its direction, that the civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognised as supreme in nearly the whole of the territory of the states confederated. It was the actual government of all the insurgent states, except those portions of them protected from its control by the presence of the armed forces of the national government.

What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* governments will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country.

The distinguishing characteristic of such a government is that the adherents to it in war against the government *de jure* do not incur the penalties of treason, and, under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will in general be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII., c. 1 (Brit. Stat. at Large), releases from penalties for treason all persons who, in defence of the king for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch: 4 Bl. Com. 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not where he has succeeded only in establishing his power over particular localities. Being in such possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by

Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It made laws, treaties, and conquests which remained the laws, treaties, and conquests of England after the restoration. The better opinion is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not the letter, of the statute of Henry VII. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 State Trials 119), in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaties were made by it. No obligations of a national character were created by it binding, after its dissolution, on the states which it represented, or on the national government. From a very early period of the civil war to its close it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are: First, that its existence is maintained by active military power within the territories and against the rightful authority of an established and lawful government; and second, that while it exists, it must necessarily be obeyed in civil matters by private citizens, who, by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for these acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September 1814 to the ratification of the treaty of peace in 1815, according to the judgment of the

court in United States v. Rice, 4 Wheat. 253, "the British government exercised all civil and military authority over the place." * * "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose."

It is not to be inferred from this that the obligations of the people of Castine, as citizens of the United States, were abrogated. They were suspended merely by the presence, and only during the presence of the paramount force.

A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court in Fleming v. Page, 9 How. 614, that although Tampico did not become a part of the United States in consequence of that occupation, still, having come together with the whole state of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States.

There were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent states differed from the temporary governments at Castine and Tampico, in the circumstance that its authority did not originate lawful acts of regular war; but it was not on that account less actual or less supreme, and we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency, by the United States. The whole territory controlled by it was thereafter held to be enemy's territory, and the inhabitants of that territory were held in most respects for enemies. To the extent then of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned.

That supremacy would not justify acts of hostility to the

United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty. Without such obedience civil order was impossible.

It was by this government exercising its power through an immense territory that the Confederate notes were issued early in the war; and these notes in a short time became almost exclusively the currency of the insurgent states.

As contracts in themselves, in the contingency of successful revolution, these notes were nullities; for except in that event there could be no payer. They bore indeed this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America."

While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force.

It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and the necessity of civil obedience on the part of all who remained in it, that this currency must be regarded in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States.

Contracts stipulating for payments in that currency cannot be regarded as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection.

We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.

The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be received to prove that a promise made in one of the insurgent states, and expressed to be for the payment of dollars, without qualifying words, was, in fact, made for the payment of any other than lawful dollars of the United States, is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any state of the Union maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence.

But it is equally clear if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.

Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent states, under the Confederate government, were in legal contemplation substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the laws imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country; and contracts made with them must be interpreted aud inferred with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word "dollar" had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract.

But it must be remembered that the whole condition of things in the insurgent states was matter of fact rather than matter of law; and, as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was almost a matter of absolute necessity. And this gave them a sort of value, insignificant and precarious enough, it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency.

In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects, and it seems to us that no rule of evidence, properly understood, requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar was actually used in the contract before us.

Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for $10,000, to enforce payment of which suit was brought in the Circuit Court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial, in conformity with this opinion.